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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| BARBARA IJEH EGBUTA,<br>Plaintiff and Appellant,<br>v.<br>TRAFFIX DEVICES, INC.,<br>Defendant and Respondent. | G055481<br>(Super. Ct. No. 30-2014-00759689)<br>O P I N I O N |

Appeal from a judgment of the Superior Court of Orange County, James Di Cesare, Judge. Affirmed.

KO Legal, Kimberly Lind; Amezcua-Moll & Associates and Rosemary Amezcua-Moll for Plaintiff and Appellant.

Fisher & Phillips, Wendy McGuire Coats, Sharlene Koonce, Mark Jarrod Jacobs and Karl R. Lindegren for Defendant and Respondent.

* * *

Plaintiff Barbara Ijeh Egbuta appeals from a judgment in favor of her former employer, defendant Traffix Devices, Inc. Plaintiff raises three issues on appeal. First, plaintiff contends the court erred by sustaining, without leave to amend, defendant's demurrer on her hostile work environment harassment claim. Second, she claims the court erred by failing to instruct the jury on willful suppression of evidence. Third, she argues the court erred by denying plaintiff's motion for a new trial based on juror misconduct.

We disagree with plaintiff's contentions. Her operative complaint failed to allege conduct constituting actionable harassment based on race or national origin; she failed to show that defendant willfully suppressed evidence; and there was insufficient evidence of prejudicial juror misconduct to warrant a new trial. Accordingly, we affirm the judgment.

## FACTS

*The Second Amended Complaint*

In May 2015, plaintiff filed the operative second amended complaint (SAC) against defendant asserting causes of action for: (1) race discrimination; (2) national origin discrimination; (3) retaliation; (4) hostile work environment harassment; (5) failure to prevent discrimination, harassment, and retaliation; (6) wrongful termination in violation of public policy; and (7) intentional infliction of emotional distress. Plaintiff alleged she is Nigerian and came to the United States in 2006. She met defendant's owners, Jack Kulp and his wife, at church. They offered her a job, and plaintiff started working for defendant in 2010.

According to the SAC, one of defendant's employees, Bill Fraker, followed plaintiff "in a suspicious and stalking manner" whenever she went to the company's warehouse or worked on inventory and vending machines in the warehouse. Plaintiff

claimed Fraker's "intense stalking consisted of following [her] out to the warehouse each and every time she walked out there, following her around the warehouse and between offices, and hiding in corners while watching [her] perform her job duties." She complained about Fraker's conduct to her supervisors, Jim Shilo and Bob Wielenga, but they allegedly dismissed her complaint without further investigation. During this time, plaintiff alleged her salary increased and her annual reviews were positive.

After she complained to her supervisors, plaintiff claimed Fraker's "harassment" intensified. She alleged Fraker "would routinely go into [Shilo's] office and speak ill of [plaintiff] in a purposeful, loud tone, which she could easily hear through the door." She then "submitted further verbal complaints regarding the behaviors of [Fraker, Shilo, and Wielenga,] which caused her to feel harassed, afraid, and humiliated." She also complained to Kulp and told him she was treated differently from other employees, but Kulp did not take any action.

In 2013, Kulp allowed plaintiff to take time off from work to be a crew leader for vacation bible school at their church. Plaintiff attended the church event in the mornings and worked for defendant in the afternoons. Defendant paid plaintiff for the time she spent working at the church event. During this time, plaintiff alleged she was not given any overtime. Although she was required to complete other employees' tasks when they were out of the office, she claimed no employees were assigned to cover her "time-sensitive tasks" while she was away. Instead, Shilo and Fraker "unreasonably harassed" her by demanding she complete her eight-hour workload in the three hours she was at work. According to the SAC, Fraker "continued his stalking behavior by watching [plaintiff] during this modified workweek and reporting to [Shilo] on every move [plaintiff] made . . . [i]ncluding what time she sat down at her desk, and which tasks she began upon arriving to her desk." Shilo also yelled at plaintiff and pounded his fist on her desk for not finishing certain tasks. Plaintiff alleged no other employee was treated this way, and she "was not able to lodge a complaint, nor present her side of the matter."

A few days later, plaintiff was given a written warning, which allegedly summarized "false facts" provided by Shilo and Fraker. In response, plaintiff filed a written complaint detailing the "discriminatory and harassing conduct" she experienced on a daily basis. Plaintiff alleged her annual review was placed on hold and she did not receive her annual raise for three months. She eventually received the annual raise and received letters suggesting her work was satisfactory.

Plaintiff claimed Fraker's "harassment and discriminatory behavior" then escalated. For example, plaintiff alleged Fraker "comment[ed] on [plaintiff's] personal information; remov[ed] paperwork from [her] desk to interfere with her job duties; and set[ plaintiff] up by leaving money on her desk to determine whether she would take it." Plaintiff alleged Fraker also requested certain documents he already had. He was angry and yelled at her. On one occasion, plaintiff gave the document to Fraker, and he "smirked and told her he already had it." On another occasion, plaintiff suggested Fraker check if he had the document, and Fraker responded, "You are crap."

After plaintiff submitted a second written complaint, she met with Shilo, Fraker, and Randy Gloyd, defendant's human resources director. During the meeting, Gloyd allegedly stated plaintiff "[did not] know what she was talking about, and . . . was using awfully big words for someone like her." He also asked her to withdraw her complaint. Plaintiff was terminated three days later for insubordination, poor job performance, lack of productivity, and inability to interact as a team player. Plaintiff alleged this was inconsistent with her termination report, which stated her quality of work, productivity, and skills were satisfactory.

Based on these allegations, plaintiff claimed she was harassed due to her race and national origin while Caucasian employees were treated differently. In August 2015, the court sustained, without leave to amend, defendant's demurrer to plaintiff's claims for hostile work environment harassment and intentional infliction of emotional distress.

*Jury Instructions*

During trial, Gloyd testified he took handwritten notes of certain meetings with plaintiff in 2013. In 2014, he typed summaries of those notes when he was aware of the present lawsuit. He destroyed the handwritten notes, and the typed versions were produced to plaintiff. According to Gloyd, the typed summaries were "close to exact," and he tried to be "as accurate as [he] possibly could." He testified "[n]othing would have been changed, the content or anything else." Based on Gloyd's testimony, plaintiff requested the court instruct the jury on CACI No. 204 regarding the willful suppression of evidence. The court found plaintiff failed to show Gloyd willfully suppressed evidence and denied plaintiff's request.

*Plaintiff's Motion for New Trial*

After the jury returned a verdict in favor of defendant on all claims and judgment was entered in defendant's favor, plaintiff moved for a new trial in part based on juror misconduct. Among other things, she argued there was racial jury bias and the jurors improperly considered outside evidence. To support her motion, plaintiff submitted the declarations of three jurors, to whom we will refer as Juror No. 1, Juror No. 2, and Juror No. 3. Juror No. 3's declaration addressed a single issue that is not relevant to this appeal.

The declarations of Juror No. 1 and Juror No. 2 stated another juror, to whom we will refer as Juror No. 4, told the jurors she had figured out the entire case, "and as a hospital [chief operating officer] with over 20 years of experience in HR (Human Resources) matters, she had determined [d]efendant was not liable." They claimed Juror No. 4 referenced her experience with "HR issues," interpreted documents based on that experience, and discussed how her company uses performance reviews. They declared Juror No. 4 stated she "knew the HR laws applicable to th[e] case by way of her professional experience, and talked about those laws." Juror No. 2 also claimed

Juror No. 4 brought "her own notebook from outside with what appeared to be four written points."

Juror No. 1 and Juror No. 2 further declared Juror No. 4 said plaintiff had to "assimilate" and "needed to speak English better." According to Juror No. 1, two other jurors similarly said plaintiff needed to "learn English" and "if she wanted to be an 'American' she needed to fit in and learn 'our culture and our language.'"

In opposition to the motion for new trial, defendant submitted Juror No. 4's declaration. She declared she did not represent herself as a Human Resources professional or expert during jury deliberations. She also claimed she did not discuss "HR laws" or the policies of her prior employers. She further denied bringing an outside notebook or information in to jury deliberations. Finally, she claimed she never said plaintiff "needed to speak English better" or that she needed to "assimilate."

The court denied the motion for new trial, concluding the evidence did not support a finding of juror misconduct. With respect to Juror No. 4's alleged bias, the court explained: "[Juror No. 4] denies making th[e] statements, and the other juror declaration submitted by [p]laintiff, from [Juror No. 3], is silent on this subject." The court also concluded "the alleged comments [would not] be sufficient to demonstrate juror irregularity or misconduct in any event." With respect to plaintiff's claim that Juror No. 4 brought outside evidence into deliberations, the court noted the juror denied doing so and the "only evidence to the contrary [was] the statement from one juror that [she] had brought 'her own notebook from outside with what appeared to be four written points.'" According to the court, this was insufficient to show the alleged misconduct occurred. Finally, with respect to plaintiff's argument that Juror No. 4 claimed to have specialized knowledge and expertise in HR matters, the court found there was insufficient evidence showing any misconduct occurred because Juror No. 4 denied doing so and Juror No. 3's declaration was silent on the subject.

## DISCUSSION

*The Court Properly Sustained the Demurrer on the Hostile Work Environment Harassment Claim Without Leave to Amend*

Plaintiff contends the court erred by sustaining the demurrer on her hostile work environment harassment claim. She argues the SAC alleges sufficient facts showing plaintiff was subjected to severe or pervasive harassment because of her race or national origin. Plaintiff also claims the court abused its discretion by denying leave to amend. Defendant disagrees and argues the SAC only reflects plaintiff's "dissatisfaction, miscommunication, and friction with co-workers." Even assuming sufficient allegations of harassment based on race or national origin, defendant contends the conduct was not severe or pervasive. Finally, defendant argues the court did not err by denying leave to amend. Because the SAC fails to allege conduct constituting actionable harassment and plaintiff would not have prevailed even if given leave to amend, the court did not err. And even if the ruling had been in error, any error was not prejudicial.

A. Standard of Review

"On appeal from a judgment after an order sustaining a demurrer, we review the order de novo, exercising our independent judgment on whether the complaint states a cause of action as a matter of law. [Citation.] We give the complaint a reasonable interpretation, reading it as a whole and viewing its parts in context. [Citation.] We deem all properly pleaded material facts as true. [Citation.] We must also accept as true those facts that may be implied or inferred from those expressly alleged." (*McMahon v. Craig* (2009) 176 Cal.App.4th 1502, 1508-1509.)

"While the decision to sustain . . . a demurrer is a legal ruling subject to de novo review on appeal, the granting of leave to amend involves an exercise of the trial court's discretion." (*McMahon v. Craig*, *supra*, 176 Cal.App.4th at p. 1509.) "The

plaintiff bears the burden of proving there is a reasonable possibility of amendment. [Citation.] The plaintiff may make this showing for the first time on appeal. [Citations.] [¶] To satisfy that burden on appeal, a plaintiff 'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.' [Citation.] The assertion of an abstract right to amend does not satisfy this burden. [Citation.] The plaintiff must clearly and specifically set forth the 'applicable substantive law' [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action. [Citations.] Allegations must be factual and specific, not vague or conclusionary." (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43-44.) If the plaintiff fails to meet his or her burden, "there is no basis for finding the trial court abused its discretion . . . ." (*Id.* at p. 44.)

B. Hostile Work Environment Harassment Claim

California's Fair Employment and Housing Act makes it unlawful for an employer to harass an employee on the basis of race or national origin. (Gov. Code, § 12940, subd. (j)(1).) A cause of action for harassment based on race or national origin must allege: (1) the plaintiff "was a member of a protected class;" (2) the plaintiff "was subjected to unwelcome . . . harassment; (3) the harassment was based on race [or national origin]; (4) the harassment unreasonably interfered with his [or her] work performance by creating an intimidating, hostile, or offensive work environment;" and (5) the employer "is liable for the harassment." (*Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 876.) To establish the fourth element, the harassment must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive environment . . . ." (*Id.* at p. 877.)

Here, the parties only dispute whether the SAC alleges plaintiff was harassed because of her race or national origin and whether it alleges the harassment was sufficiently severe or pervasive. With respect to the first issue, the SAC alleges Fraker followed plaintiff in a suspicious and stalking manner; he once stated, "You are crap"; supervisors yelled at plaintiff for not completing work assignments; Gloyd said plaintiff "was using awfully big words for someone like her"; and Gloyd reported a complaint about plaintiff but she was not allowed to present her side of the story. According to the SAC, plaintiff was treated this way while Caucasian employees were treated differently.

Despite the undesirable work environment described in the SAC, there are no factual allegations showing plaintiff was harassed because of her race or national origin. Although the SAC alleges plaintiff was treated differently from other employees and "was subjected to unwanted, continuous and escalating, racial/ethnic harassment because of her [Nigerian descent]," there are no facts alleged supporting plaintiff's subjective belief that her supervisors' conduct was racially motivated. Indeed, no racial animus toward Nigerians can be drawn from the allegations.

Instead, the statements and conduct described in the SAC suggest plaintiff received negative feedback due to friction with co-workers. Harassment, as distinguished from discrimination, "'consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives. Harassment is not conduct of a type necessary for management of the employer's business or performance of the supervisory employee's job.'" (*Reno v. Baird* (1998) 18 Cal.4th 640, 645-646.) Although Gloyd allegedly stated plaintiff "was using awfully big words for someone like her," "it is no more reasonable to infer [the statement] had any racial motive or content than it is to infer it was race-neutral." (*Thompson v. City of Monrovia*, *supra*, 186 Cal.App.4th at p. 878.) The SAC fails to allege conduct constituting *actionable* harassment, i.e., harassment based on race or national origin. Accordingly, we need not address the second issue

raised by the parties—whether the SAC alleges actionable harassment that was sufficiently severe or pervasive.

C. Leave to Amend

Plaintiff contends she could have strengthened her hostile work environment harassment claim by amending the SAC. Plaintiff claims she would have included an allegation that she submitted a written complaint to defendant notifying defendant that Fraker had called her "violet." In her opposition to the demurrer, plaintiff stated "[i]t is commonly known that when African Americans are referred to as the color purple, it is meant in a derogatory way, meaning the person is so black he/she is purple."

Even assuming plaintiff's allegation could cure the defects in the SAC, there was no prejudicial error. "To obtain reversal, [the plaintiff] must show an asserted error by the trial court '"was sufficiently prejudicial to justify a reversal."' [Citation.] Prejudicial . . . means that the error 'substantially affect[ed] the rights and obligations of [the plaintiff] as to result in a miscarriage of justice.' [Citation.] If a suit would have failed or been dismissed even in the absence of an asserted error, the error is plainly not prejudicial to [the plaintiff] and thus reversal is not warranted." (*Tanguilig v. Neiman Marcus Group, Inc.* (2018) 22 Cal.App.5th 313, 334.)

Here, plaintiff went to trial on her causes of action for race and national origin discrimination, retaliation, failure to prevent discrimination, harassment, and retaliation, and wrongful termination. She testified she was harassed and discriminated against because of her race and pointed to an instance when Fraker referred to her as "violet." Several other witnesses also testified about Fraker's comment. According to their testimony, Fraker did not call plaintiff "violet." Instead, they testified Fraker joked about how they had a "violent" department. Considering all of the evidence, the jury found in favor of defendant on all claims.

The claims on which plaintiff did not prevail are similar to the hostile work environment harassment claim. (Compare CACI No. 2521A—hostile work environment harassment claim—[requiring plaintiff prove she was subjected to harassment based on her protected status, which includes race or national origin], with CACI 2527—failure to prevent discrimination, harassment, or retaliation claim—[requiring plaintiff prove she was subjected to harassment, discrimination, or retaliation and defendant failed to take all reasonable steps to prevent the harassment, discrimination, or retaliation], and CACI No. 2500—disparate treatment claim—[requiring plaintiff prove her protected status, which includes race or national origin, was a substantial motivating reason for defendant's adverse employment action].) We accordingly are not persuaded that plaintiff would have prevailed on her hostile work environment harassment claim even if the court had granted leave to amend. Plaintiff has not shown the court committed prejudicial error by sustaining the demurrer without leave to amend.

*The Court Was Not Required to Instruct the Jury on Willful Suppression of Evidence Pursuant to CACI No. 204*

Plaintiff contends the court erred by failing to instruct the jury on CACI No. 204 regarding the willful suppression of evidence. The instruction provides: "You may consider whether one party intentionally concealed or destroyed evidence. If you decide that a party did so, you may decide that the evidence would have been unfavorable to that party." (CACI No. 204.) According to plaintiff, substantial evidence supported the instruction because there was evidence Gloyd destroyed his handwritten notes of meetings with plaintiff. We disagree and find there was insufficient evidence of willful suppression to warrant a jury instruction on the issue.

Challenges to jury instructions are subject to de novo review. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) "A party is entitled to have the jury instructed on his theory of the case, if it is reasonable and finds support in the pleadings and evidence or any inference which may properly be drawn from the evidence." (*Western Decor & Furnishings Industries, Inc. v. Bank of America* (1979) 91 Cal.App.3d 293, 309.) CACI No. 204 may be given only "if there is evidence of willful suppression, that is, evidence that a party destroyed evidence with the intention of preventing its use in litigation." (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1434.) Indeed, it is prejudicial error to give the instruction in the absence of a showing of willful destruction of evidence. (*Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 992, disapproved on another ground in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664.)

Here, plaintiff did not present sufficient evidence of willful suppression. Gloyd testified he created certain handwritten notes in 2013 and typed summaries of those notes in 2014 when he was aware of the present lawsuit. He destroyed the handwritten notes and gave the typed versions to his attorneys who produced them to plaintiff. As defendant notes, plaintiff has pointed to no evidence suggesting Gloyd was required to preserve his handwritten notes after typing them. Gloyd also testified the typed summaries were "close to exact" to the handwritten notes and he tried to be "as accurate as [he] possibly could." According to Gloyd, "[n]othing would have been changed, the content or anything else." He testified he was never told it was a "best practice" to destroy his notes, but he explained it was his normal practice to handwrite his notes and then type summaries afterwards. Based on this testimony, there was no evidence Gloyd intentionally destroyed the handwritten notes to prevent their use in the present lawsuit. Given the lack of any evidence of willful suppression, the court did not err by refusing to instruct the jury on CACI No. 204.

*The Court Did Not Err by Finding No Juror Misconduct*

Plaintiff contends the court erred by refusing to allow a new trial based on juror misconduct. First, she claims juror racial bias affected deliberations and was concealed during voir dire. Second, she argues the jurors improperly considered outside evidence. Third, she contends some jurors refused to consider evidence and failed to deliberate. We are not persuaded there was prejudicial misconduct.

To determine whether a party has established juror misconduct, "[t]he trial court must first 'determine whether the affidavits supporting the motion are admissible. [Citation.]' [Citation.] This, like any issue of admissibility, we review for abuse of discretion. [Citation.] [¶] Second, 'If the evidence is admissible, the trial court must determine whether the facts establish misconduct. [Citation.]' [Citation.] . . . [Citation.] On review from a trial court's 'determin[ation of] whether misconduct occurred, "[w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citations.]"' [Citations.] [¶] '"Lastly, assuming misconduct, the trial court must determine whether the misconduct was prejudicial."'" (*Barboni v. Tuomi* (2012) 210 Cal.App.4th 340, 345.) We review the issue of prejudice independently. (*People v. Nesler* (1997) 16 Cal.4th 561, 582-583.)

In her reply brief, plaintiff argues the court erred by sustaining certain evidentiary objections to the declarations. Plaintiff waived this argument by failing to raise it in her opening brief. (See *Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1292, fn. 6 ["Arguments presented for the first time in an appellant's reply brief are considered waived"]; *Holmes v. Petrovich Development Co., LLC* (2011) 191 Cal.App.4th 1047, 1064, fn. 2 ["argument is forfeited" where "it is raised for the first time in [appellant's] reply brief without a showing of good cause"].) We accordingly are only concerned with whether the admissible evidence establishes prejudicial juror misconduct.

Here, the court did not err by finding there was insufficient evidence the jurors were racially biased against plaintiff. Although two jurors declared Juror No. 4 said plaintiff needed to "assimilate" and "speak English better," Juror No. 4 denied making these statements. It was for the court to weigh the conflicting declarations and determine which it found credible. (*Barboni v. Tuomi*, *supra*, 210 Cal.App.4th at p. 349.) With respect to the statements that plaintiff needed to "learn English" and "fit in and learn 'our culture and our language,'" only one juror had reported those statements had been made. The two jurors who allegedly made those statements also were not identified. On this record, the evidence does not show the jurors were actually biased against plaintiff or lacked impartiality. (*People v. Delgado* (2010) 181 Cal.App.4th 839, 851.)

Likewise, while one juror declared Juror No. 4 brought an outside notebook into deliberations, Juror No. 4 denied this, declaring she only used a notebook provided by the court. She also denied discussing any HR laws or outside policies with other jurors. Once again, we do not second guess the court's credibility determinations with respect to the conflicting declarations. Although one juror further stated Juror No. 4 discussed how her company uses performance reviews, a juror with specialized knowledge based on his or her experience is not prohibited from using that experience to interpret the evidence. (*People v. Steele* (2002) 27 Cal.4th 1230, 1266.) "[D]uring the give and take of deliberations, it is virtually impossible to divorce completely one's background from one's analysis of the evidence. We cannot demand that jurors . . . never refer to their background during deliberations." (*Ibid.*)

Plaintiff's reliance on *People v. Nesler*, *supra*, 16 Cal.4th 561 is misplaced. In that case, our Supreme Court found there was juror misconduct where a juror overheard information about the case in a bar and revealed the information to fellow jurors. (*Id.* at p. 579; see *id.* at pp. 587-590.) The juror did not deny relaying some of this information to the other jurors. (*Id.* at pp. 572-573.) Unlike the situation in *Nesler*, the record does not suggest Juror No. 4 brought any outside information about plaintiff

into the jury's deliberations, and Juror No. 4 denied discussing any outside laws or policies.

Finally, plaintiff contends some jurors refused to deliberate and consider evidence. In support of this, plaintiff relies on the declarations of Juror No. 1 and Juror No. 2, which stated several jurors wanted to review certain testimony and ask questions but other jurors said it would not change their minds "so there was no reason to review the testimony or ask legal questions of the judge." The court sustained defendant's objections to this testimony, and plaintiff waived any challenge by failing to address the court's evidentiary rulings until the reply brief. (*Habitat & Watershed Caretakers v. City of Santa Cruz, supra,* 213 Cal.App.4th at p. 1292, fn. 6; *Holmes v. Petrovich Development Co., LLC, supra,* 191 Cal.App.4th at p. 1064, fn. 2.) Regardless, a perception by one juror that another juror refused to deliberate establishes juror misconduct only if there has been an "objective failure to deliberate, such as jurors who turned their backs or otherwise objectively segregated themselves from the deliberations." (*People v. Thompson* (2010) 49 Cal.4th 79, 141.) That is not what is described in the declarations. The declarations only suggest some jurors did not think certain testimony or follow-up questions would change their decision. There is no evidence the jurors did not consider the relevant testimony or evidence in the first instance, and the jurors who wanted to consider the additional information were free to do so.

Because we find insufficient evidence of juror misconduct, we need not address whether there was prejudice resulting from any misconduct.

## DISPOSITION

The judgment is affirmed. Defendant shall recover its costs on appeal.

IKOLA, J.

WE CONCUR:

FYBEL, ACTING P. J.

THOMPSON, J.